

BEFORE THE UTAH STATE TAX COMMISSION

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<p>PETITIONER,</p> <p>Petitioner,</p> <p>v.</p> <p>DIVISION OF MOTOR VEHICLES OF THE UTAH STATE TAX COMMISSION,</p> <p>Respondent.</p>	<p><b>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION</b></p> <p>Appeal No. 07-1226</p> <p>Case Type: Personalized License Plate</p> <p>Judge: Chapman</p>
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**Presiding:**

Marc B. Johnson, Commissioner  
Kerry R. Chapman, Administrative Law Judge

**Appearances:**

For Petitioner: PETITIONER  
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General  
RESPONDENT REPRESENTATIVE 2, from the Division of Motor Vehicles

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on July 9, 2008. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. PETITIONER (the “applicant”) asks the Commission to issue him a personalized license plate that displays the letters “( X )”.
2. The Division of Motor Vehicles (“Division”) denied the applicant’s request for the license plate at issue in a letter dated September 4, 2007. The Division denied the request because the requested plate contains a reference to ( X ), an illegal drug that is also known as “( X )”.
3. The applicant submitted a letter in which he explains why he should be issued a personalized license plate with the display “( X )”. Exhibit P-1. The applicant’s arguments include:

a. The applicant wants the license plate at issue for a Porsche sports car and contends that the term is intended to show a car enthusiast's state of mind when driving such a car. The applicant acknowledges that the word "( X )" is a slang term that can refer to an illegal drug. He points out, however, that the definition of "( X )" in *RandomHouse Dictionary* does not include the slang drug reference. He asserts that the Commission should consider that the "true meaning" of the word "( X )," which is defined in the dictionary to mean: SENTENCE REMOVED.

b. The applicant also contends that a Utah license plate is a "defensible realm of free speech."

4. The applicant further stated that he had other arguments in support of the Commission issuing the license plate, but chose not to present the arguments at the Formal Hearing. He stated that he was reserving the additional arguments for future court proceedings.

5. The Division presented evidence that shows that the letters "( X )" refer to the drug ( X ), which is commonly known as "( X )." Exhibit R-1.

6. The Division asserts that it is precluded from issuing a license plate that contains letters that connote any narcotic, intoxicant or illegal drug, pursuant to Utah Admin. Rule R873-22M-34(2)(c). As a result, the Division asks the Commission to sustain its decision not to issue a license plate with the display "( X )".

#### APPLICABLE LAW

1. Utah Code Ann. §41-1a-411 provides for the application for and refusal of personalized license plates, as follows:

- (1) An applicant for personalized license plates or renewal of the plates shall file an application for the plates in the form and by the date the division requires,

indicating the combination of letters, numbers, or both requested as a registration number.

- (2) The division may refuse to issue any combination of letters, numbers, or both that may carry connotations offensive to good taste and decency or that would be misleading.

2. Utah Admin. Rule R873-22M-34 (“Rule 34”) provides guidance concerning the

issuance of personalized license plates, as follows in pertinent part:

(1) The personalized plate is a non-public forum. Nothing in the issuance of a personalized plate creates a designated or limited public forum. The presence of a personalized plate on a vehicle does not make the plate a traditional public forum.

(2) Pursuant to Section 41-1a-411(2), the division may not issue personalized license plates in the following formats:

....

(c) Combinations of letters, words, or numbers that connote the substance, paraphernalia, sale, user, purveyor of, or physiological state produced by any narcotic, intoxicant, or illicit drug.

....

3. In *McBride v. Motor Vehicle Division*, 1999 UT 9, 977 P.2d 467 (Utah 1999), the

Utah Supreme Court ruled as follows in pertinent part:

P12 The legislature granted the Commission discretion in determining whether . . . to grant or refuse an applicant's request for personalized license plates. See Utah Code Ann. § 41-1a-411 . . . An agency which has been granted discretion by statute may limit its own discretion in its regulations. See *Ashcroft v. Industrial Comm'n*, 855 P.2d 267, 269 (Utah Ct. App. 1993). By adopting rule 873-22M-34 the Commission limited the discretion given to it by the legislature. See Utah Admin. Code R873-22M-34 (stating that "the division may not issue {977 P.2d 470} personalized license plates . . . with any connotation that is vulgar, derogatory, profane, or obscene." (emphasis added)). . . .

P15 Relying upon the opinion of any one person or group in determining whether a term carries a prohibited connotation is not a reasonable application of either section 41-1a-411 or rule 873-22M-34. . . . Permitting the Commission to base its decisions upon the personal opinions of its commissioners would be tantamount to allowing an agency to follow or ignore its own rules to suit its own purposes--an approach which lies at the very heart of arbitrary and capricious action and which would frustrate the Commission's proper role to apply its rules consistently and objectively, regardless of the personal views of individual commissioners.

P16 Likewise, . . . it would not be reasonable for the Commission to rely upon the general public's perception of a certain term because the general public may be wholly ignorant of a term's connotation. For example, offensive slang in an obscure

foreign language may be meaningless to the general English-speaking public; nevertheless, the reasonable person who speaks the foreign language would conclude that the slang carries an offensive connotation. . . .

P17 Finally, the Commission could not reasonably rely upon the opinion of any one group, whether it be small or large. Such an approach could preclude the issuance of any personalized license plate because the members of any group could assert that any given term is offensive to them. . . .

P18 The only reasonable standard that may be applied is that of the objective, reasonable person. In other words, under . . . rule 873-22M-34 the Commission had to determine, in light of all the evidence presented, whether an objective, reasonable person would conclude that the term "redskin" contains any vulgar, derogatory, profane, or obscene connotation, or expresses contempt, ridicule, or superiority of race or ethnic heritage. . . . If such a person would conclude that the term carries a prohibited connotation, rule 873-22M-34 prohibits the Commission from issuing a license plate carrying that term.

#### CONCLUSION OF LAW

1. Rule 34(1) clarifies that a license plate is a “non-public forum.” Accordingly, the Commission finds the applicant’s argument that free speech rights require the issuance of a “( X )” license plate to be erroneous.

2. The letters “( X )” contain a connotation to the drug “( X ).” Pursuant to Rule 34(2)(c), the Commission finds that displaying “( X )” on a license plate would violate Utah law.

3. Although the word “( X )” has other meanings not related to illegal drugs, the Commission finds that the Utah Supreme Court’s ruling in *McBride* precludes the issuance of a “( X )” license plate. Specifically, the Commission finds that an objective, reasonable person would conclude that the letters “( X )” carry a prohibited connotation.

#### DECISION AND ORDER

Based on the foregoing, the Commission sustains the Division’s decision not to issue a “( X )” license plate. Accordingly, the applicant’s appeal is denied. It is so ordered.

Appeal No. 07-1226

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

\_\_\_\_\_  
Kerry R. Chapman  
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION.

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

Pam Hendrickson  
Commission Chair

R. Bruce Johnson  
Commissioner

Marc B. Johnson  
Commissioner

D'Arcy Dixon Pignanelli  
Commissioner

**Notice of Appeal Rights:** You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63-46b-13. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §59-1-601 et seq. and §63-46b-13 et seq.

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